No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, *individually and on behalf of her late husband*, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, *individually and on behalf of his late father*, CLEMENTE TUSIMA, *Petitioners*,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT CO. OF NIGERIA, LTD., *Respondents*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR AMICI CURIAE THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL MINING ASSOCIATION, THE INTERNATIONAL CHAMBER OF COMMERCE UK, THE ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE, THE FEDERATION OF GERMAN INDUSTRIES, THE CONFEDERATION OF BRITISH INDUSTRY, THE CONFEDERATION OF NETHERLANDS' INDUSTRY AND EMPLOYERS, AND BUSINESSEUROPE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTEREST OF AMICI CURIAE[1]

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned with the proliferation of unilateral foreign policy sanctions at the federal, state, and local level. Established in 1997, USA*Engage seeks to inform policymakers, opinion-leaders, and the public about the counterproductive nature of unilateral sanctions, the importance of exports and overseas investment for American competitiveness and jobs, and the role of American companies in promoting human rights and democracy worldwide.

The United States Council for International Business is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers, and the Business Industry Advisory Committee to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the Organization for Economic Cooperation and Development.

The American Petroleum Institute (API) is a nationwide, not-for-profit trade association whose membership includes more than 400 companies involved in all aspects of the oil and natural gas industry. API is a frequent advocate on important issues of public policy affecting its members' interests before courts, legislative bodies, and other forums.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. Its member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States and are affiliates of companies transacting business around the globe.

The American Insurance Association (AIA) is a leading national trade association that counts among its members many major property and casualty insurance companies writing business nationwide and globally. On issues of importance to the property and casualty

insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files amicus briefs in significant cases before federal and state courts.

The National Mining Association (NMA) is a national not-for-profit trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The International Chamber of Commerce UK (ICC UK) is a business organization in the United Kingdom (UK) with member companies from a wide variety of industry sectors, including telecommunications, pharmaceuticals, financial services, and consumer goods. ICC UK acts as an advocate for member companies in the UK that do business around the world, with the aims of promoting open markets, level playing fields for business, and sensible regulation.

The Association of German Chambers of Industry and Commerce (Deutscher Industrie- und Handelskammertag e.V. (DIHK)) is the umbrella organization of Germany's 80 regional Chambers of Industry and Commerce, representing by law the interests of more than 3.6 million commercial enterprises of all sizes

in Germany. Further, it supervises and coordinates the German Chamber Network (Auslandshandelskammern (AHKs)) with 120 locations in 80 countries worldwide, including in the United States.

The Federation of German Industries (Bundesverband der Deutschen Industrie (BDI)) serves as the umbrella organization for associations of industrial businesses and industry-related service providers in Germany.

Together, the Association and the Federation represent businesses that employ millions of people worldwide. The BDI and DIHK are represented in the United States by the Representative of German Industry and Trade in Washington, D.C.

The Confederation of British Industry (CBI) is the UK's leading business organization, speaking for some 240,000 businesses that together employ around a third of the private sector workforce. With offices across the UK as well as representation in Brussels, Washington, Beijing, and New Delhi, the CBI coordinates the voice of British business around the world. The CBI's mission is to promote the conditions in which businesses of all sizes and sectors in the UK can compete and prosper for the benefit of all. To achieve this, the CBI campaigns in the UK, the European Union (EU), and internationally for a competitive business environment.

The Confederation of Netherlands' Industry and Employers (VNO-NCW) is the largest and most influential nationwide organisation of business in the Netherlands. It represents 175 federations, with a total membership of more than 125,000 companies in all sectors of the economy, employing around 85% of the workforce in the Dutch market sector. The aim of

VNO-NCW is to promote the interests of Dutch business and an open and competitive national and international business environment. VNO-NCW is active on the national level, as well as on the EU, OECD, and global levels.

BUSINESSEUROPE plays a crucial role in Europe as the main horizontal business organization at the EU level. Through its 41 member federations, BUSINESSEUROPE represents millions of companies from 35 countries. Its main task is to ensure that companies' interests are represented and defended vis-à-vis the European institutions with the principal aim of preserving and strengthening corporate competitiveness. BUSINESSEUROPE is active in the European social dialogue to promote the smooth functioning of labor markets. It is also a strong supporter of closer transatlantic economic relations and engages regularly with American business associations and government officials to advance trade and investment across the Atlantic.

SUMMARY OF ARGUMENT

Amici agree with Respondents that the Alien Tort Statute (ATS) does not authorize U.S. courts to fashion a cause of action for violations of the law of nations occurring within the territory of a foreign sovereign. This Court has long embraced a presumption that U.S. law does not apply extraterritorially, and nothing in the ATS overcomes that presumption. This longstanding presumption applies based on the fact that the relevant conduct occurred abroad, not based on the citizenship or residence of the defendant. Because nothing in the text or history of the ATS demonstrates that Congress intended the ATS to authorize U.S. causes of action for conduct occurring within a foreign nation, that canon is

sufficient to decide the issue. As Respondents also argue, however, the established canon that domestic law should be interpreted, whenever possible, harmoniously with international law independently supports the same result in view of the absence of any international consensus supporting the exercise of extraterritorial civil jurisdiction. *See infra* Part I.

Petitioners and certain Amici attempt to overcome the strong presumption against extraterritorial application of U.S. law in part by pointing to the transitory torts doctrine. They argue that the transitory torts doctrine supplies a historical analogy to ATS suits, and that the First Congress therefore would have understood the ATS to apply to conduct occurring within foreign nations. Petitioners and those Amici are wrong.

The presumption against extraterritorial application of U.S. law is designed principally to avoid the discord that would otherwise result from applying U.S. law to conduct occurring in other countries. *See infra* Part II.A. Extraterritorial ATS claims provoke such international tension because they render conduct overseas subject to U.S. law—and to international law as interpreted by U.S. courts. Transitory torts cases, by contrast, historically applied the cause of action arising under the law of the situs, i.e., the nation where the underlying tortious conduct occurred. Thus, contrary to extraterritorial ATS suits, transitory torts cases promoted international harmony by respecting and giving effect to the sovereign lawmaking powers of foreign nations. *See infra* Part II.B.

Contrary to Petititoners' suggestion, *see* Pet. Supp. Br. 30; International Law Scholars Supp. Amicus Br. 18, that distinction between transitory torts and extraterritorial ATS suits is far more than formalistic. In-

deed, it goes to the core purpose of the presumption against extraterritoriality: avoiding conflict with foreign nations. Whereas applying a cause of action arising under the law of the situs vindicates the sovereignty interests of foreign nations, extraterritorial ATS suits often have precisely the opposite effect. Petitioners and certain Amici attempt to elide the basic difference between transitory torts and extraterritorial ATS suits by suggesting that international law is effectively the law of every country in the world. But that argument fails on many levels. *First*, many nations (like the United States) have neither made international-law norms self-executing nor incorporated international law wholesale into their domestic law. *Second*, even with respect to norms said to be universal at a general level, there remain fundamental disagreements among nations over the precise content of these international-law norms. *Third*, as Justice Breyer emphasized in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), even when a foreign country agrees with U.S. courts on the precise definition of universally condemned behavior, there may be disagreement regarding whether universal jurisdiction exists to sue based on that conduct. *Id.* at 761-762 (Breyer, J., concurring in part and concurring in the judgment). *See infra* Part II.C. In light of these considerations, it is unsurprising that, as the United States and other Amici explain, extraterritorial ATS suits have in fact provoked protests from many foreign governments. *See infra* Part II.D.

ARGUMENT

I. AMICI AGREE WITH RESPONDENTS THAT THE ATS DOES NOT AUTHORIZE U.S. COURTS TO FASHION A CAUSE OF ACTION FOR VIOLATIONS OF THE LAW OF NATIONS OCCURRING WITHIN THE TERRITORY OF A FOREIGN SOVEREIGN

Amici fully endorse Respondents' position that the ATS cannot be read to apply extraterritorially. *See* Resp. Supp. Br. 10-48. That conclusion follows first and foremost from the longstanding presumption against extraterritorial application of U.S. substantive law. *See, e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010). Importantly, this principle applies regardless of the citizenship or residence of the defendant because the presumption turns on the site of the conduct, not the identity of the defendant. *See* Resp. Supp. Br. 4, 8, 33-37. The conclusion that the ATS does not apply to conduct in other countries is independently compelled by a second consideration—the interpretative canon that U.S. law should be understood whenever reasonably possible to be consistent with international law. *See Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). As Respondents explain (at 37-48), international law provides no support for extraterritorial civil jurisdiction of the type that would flow from the reading of the ATS that Petitioners advocate. For these reasons as well as those explained here, Amici agree with Respondents that the ATS should not be interpreted to authorize actions based on conduct occurring within the territory of other nations.

II. The Transitory Torts Doctrine Does Not Support Interpreting The ATS As Applying To Conduct Occurring Within The Territory Of A Foreign Sovereign

In support of their argument that the ATS should be interpreted to apply to conduct occurring within the territory of another country, Petitioners (and certain Amici) rely in part on the so-called transitory torts doctrine. They contend that the First Congress would have found nothing unusual about the ATS's applying extraterritorially because "[t]he transitory tort doctrine, inherited from English common law upon this nation's founding, allows for suit against a tortfeasor regardless of where the cause of action arises, so long as personal jurisdiction is satisfied." Pet. Supp. Br. 27; *see* Casto *et al.* Supp. Amicus Br. 7-25; New York City Bar Association Supp. Amicus Br. 14-15 & n.17; South African Jurists Supp. Amicus Br. 3; Law of Nations Scholars Supp. Amicus Br. 30-31; Human Rights First *et al.* Supp. Amicus Br. 5-7; Professors of Civil Procedure Supp. Amicus Br. 4 & n.3; International Law Scholars Supp. Amicus Br. 16-20.

Petitioners' reliance on the transitory torts doctrine is deeply flawed. First and most fundamentally, that doctrine has no application to questions of extraterritoriality because it simply does *not* involve the extraterritorial application of U.S. law. *See* U.S. Supp. Amicus Br. 18 n.7. On the contrary, pursuant to the doctrine, U.S. courts in certain instances have long adjudicated tort claims based on conduct occurring abroad, but the substantive law applied was (and is) always the law of the situs—that is, the law of the foreign state where the wrongful conduct allegedly occurred—never U.S. law. In that way, the doctrine promotes comity with foreign states by enforcing

causes of action under foreign law when someone alleged to have breached foreign law is found in the United States.

Suits brought under the ATS, by contrast, arise under U.S. law, namely, federal common law, as this Court held in *Sosa*. *See* 542 U.S. at 724; U.S. Supp. Amicus Br. 18 n.7 (noting that this case presents a "distinct question" from the transitory torts doctrine—namely, "whether a cause of action should be recognized as a matter of federal common law"). And while ATS suits involve application of international-law norms that, at a general level, have widespread acceptance, the role of international law in ATS cases differs fundamentally from the law of the situs in transitory torts cases. First, in extraterritorial ATS cases, international-law norms are applied regardless of whether the particular country where the torts allegedly occurred would recognize those same norms—with exactly the same elements—under its domestic law. Second, extraterritorial ATS cases proceed regardless of whether the nation where the torts occurred permits a judicial cause of action (as distinct from administrative or other non-judicial proceedings), let alone one enforced by damages remedies typically available in U.S. civil cases.

These differences between run-of-the-mill transitory torts cases and extraterritorial ATS suits are fundamental. The distinctions go to the core purpose of the presumption against extraterritoriality—namely, avoiding the potential discord caused by U.S. courts applying U.S. law to, and thereby effectively regulating, conduct occurring within the territory of a foreign sovereign. Far from advancing international harmony, extraterritorial ATS suits would likely continue to cre-

ate the very international friction the presumption against extraterritoriality was developed to avoid.

A. The Presumption Against Extraterritoriality Is Designed To Avoid Discord Caused By Application Of U.S. Law Abroad

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 130 S. Ct. at 2877 (internal quotation marks omitted); *cf. The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (laws of one nation "have no force to control the sovereignty or rights of any other nation, within its own jurisdiction" and, for that reason, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction"). The primary purpose of the presumption against extraterritorial application of U.S. law is to avoid the international discord that predictably results from extending U.S. law to conduct occurring in foreign states. As this Court explained in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *See* U.S. Supp. Amicus Br. 16 ("presumption is grounded in significant part on the concern that projecting U.S. law into foreign countries 'could result in international discord'") (quoting *Arabian Am. Oil*, 499 U.S. at 248).

In that way, the presumption "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S.

155, 164-165 (2004); *see also, e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) ("[t]he possibility of international discord cannot ... be gainsaid" from interpreting a statute to apply U.S. law to apply to foreign-flag vessels); *Predictability and Comity*, 98 Harv. L. Rev. 1310, 1310 (1985) ("[t]he most visible consequences of the aggressive and inconsistent outward reach by United States courts are strained foreign relations with the United States' trading partners"). The presumption also guards against the possibility that other nations will seek to apply foreign law to conduct occurring outside their borders to U.S. officials and nationals. *See, e.g.*, U.S. Supp. Amicus Br. 1-2 (noting that extraterritorial application of the ATS risks "exposure of U.S. officials and nationals to exercises of jurisdiction by foreign states").

This Court recognized similar concerns in the context of the ATS in *Sosa*. In explaining why ATS suits should proceed, "if at all, with great caution," the Court observed that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." 542 U.S. at 727-728. This concern is only compounded where, as in this case and many extraterritorial ATS suits, the alleged tortious conduct involves either acts by a foreign state or acts aiding and abetting conduct of a foreign state within that government's own territory. *Cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 417-418 (1964) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." (internal quotation marks omitted)); *American Banana*

Co. v. *U.S. Fruit Co.*, 213 U.S. 347, 356 (1909); *see* U.S. Supp. Amicus Br. 13-15.

B. The Transitory Torts Doctrine Has Never Implicated Concerns About Extraterritoriality Because It Requires Application Of The Law Of The Situs, Not U.S. Law Or International-Law Norms

The transitory torts doctrine sheds no light on whether the First Congress intended the ATS to apply extraterritorially because the doctrine has nothing to do with the extraterritorial application of U.S. law. No one disputes that, under English and American common law, personal injury torts have by and large been considered transitory. Thus, much of the ink Petitioners and their Amici spill on this issue speaks to issues that are not in dispute. The key point is that the transitory torts doctrine historically did not involve the extraterritorial application of U.S. substantive law, and for that reason, such suits by definition did not raise the specter of conflict between U.S. and foreign law. *See, e.g.*, Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 Stanford J. Int'l L. 121, 138 n.108 (2010) (transitory torts doctrine is "irrelevant" to the ATS because the doctrine "does not allow a court to exercise extraterritorial prescriptive jurisdiction by applying the law of the forum as rules of decision in such cases"); Resp. Supp. Br. 17-19.

In fact, a fundamental purpose of the transitory torts doctrine was to promote "comity" by "giv[ing] effect to the laws of the state where the wrong occurred." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); *see King* v. *Sarria*, 69 N.Y. 24, 30-31 (1877) ("[O]ne country recognizes and admits the operation

within its own jurisdiction, *of the laws of another* .... It does this on the principle of comity. It has been so long practised that it is stated as a principle of private international jurisprudence; that rights which have once well accrued by the law of the appropriate sovereign are treated as valid everywhere." (emphasis added)). Extraterritorial ATS suits predictably undermine, rather than promote, that interest in comity, as explained in detail below. *See infra* Part II.C. That is because such suits require U.S. courts to apply a cause of action arising under U.S. common law and shaped by international-law norms without regard to the domestic law of the foreign state where the conduct occurred.

There should be no dispute on the threshold point that transitory torts cases historically involved the application of the substantive law of the situs, not the law of the forum or international law. As the United States explains in its supplemental brief (at 18 n.7), transitory torts cases "would be heard, if at all, under the law of the foreign state." This is true of both the English and American common-law traditions.

Mostyn v. *Fabrigas*, (1774) 98 Eng. Rep. 1021 (K.B.)—which Petitioners call (at 27) the "leading transitory tort case of the era"—is illustrative of the English cases. That case involved allegations against the Governor of Minorca of assault and false imprisonment, including banishment of the plaintiff from Minorca to Cartagena in Spain. Lord Mansfield held that venue was proper in England because of the transitory character of the torts at issue, but he made clear that liability would be judged by the law of the situs: "For whatever is a justification *in the place where the thing is done*, ought to be a justification where the case is tried." 98 Eng. Rep. at 1029 (emphasis added). In response to an objection that an English court could not

know foreign law, Lord Mansfield explained that "[t]he way of knowing foreign laws is, by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is." *Id.* at 1028. Leading conflict-of-laws scholars have reasoned that Lord Mansfield's express recognition of the role of the law of the situs reflected that "it would be unfair to judge [the defendant's] conduct by English rules and standards simply because he happened to come under the power of the common law process" and that it was necessary to "respect the authority of the government ruling the territory where the wrong was committed." Hancock, *Torts in the Conflict of Laws* 7-8 (1942) (internal quotation marks omitted).[2]

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[2] Whether there was any variation in practice among English courts on this score, *see* Casto *et al.* Supp. Amicus Br. 13, U.S. courts uniformly understood the English common-law tradition to apply the law of the situs. *See, e.g.*, *Whitford* v. *Panama R.R. Co.*, 23 N.Y. 465, 475 (1861) ("[F]oreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be. The cases of *Rafael v. Verelst* and *Mostyn v. Fabrigas* were decided upon the presumption respecting the foreign law to which I have referred." (citations omitted)); *see also* Hancock 11 (noting the law in England settled on the view that "[t]o succeed in a suit based upon a foreign tort, the plaintiff must show an obligation to pay damages created by the law of the place of wrong"). This Court long ago affirmatively embraced the principle that the law of the situs is controlling. *See Slater* v. *Mexican Nat'l R.R.*, 194 U.S. 120, 127 (1904) (noting the Court was aware of "expressions of a different tendency ... in some English cases" but holding that the "only theory by which actions fairly can be allowed to be maintained for foreign torts" is based upon the law of the situs of the wrongful conduct).

U.S. courts had little difficulty reaching the same conclusion regarding the scope of the doctrine. Conflict-of-law scholars have explained that, as the principle of transitory torts developed in U.S. courts, "[t]he plaintiff who could not make out a good cause of action under the law of the place of wrong was not permitted to succeed elsewhere." Hancock 22 (collecting cases). Thus, in American courts, "[a] variety of language was used to convey the general idea that the legal effect of acts and events must be determined by the law in force where they took place." *Id.* at 23. Justice Story made this point emphatically in his treatise: "The doctrine of the common law is so fully established on this point, that it would be useless to do more than to state the universal principle, which it has promulgated; that is to say, that, in regards to the merits and rights involved in actions, the law of the place, where they originated, is to govern[.]" Story, *Commentaries on the Conflict of Laws* § 558 (3d ed. 1846).

This Court's decision in *Slater* v. *Mexican National Railroad Co.* 194 U.S. 120 (1904), states the rule unequivocally. *Slater* involved a suit by citizens and residents of Texas against a Colorado corporation operating a railroad that ran from Texas to Mexico. Plaintiffs were the widow and children of an employee who had worked on the railroad and had been killed because of alleged negligence of the company in Mexico. This Court explained that when a "liability" arising in another jurisdiction "is enforced in a jurisdiction foreign to the place of the wrongful act" it is "obvious[]" that the act is not "in any degree ... subject to the *lex fori*, with regard to either its quality or its consequences." *Id.* at 126. The Court reasoned that "the only source of th[e] obligation is the law of the place of the act," and "it follows that that law determines not merely the ex-

istence of the obligation, but equally determines its extent." *Id.* Indeed, the Court held it was "clearly wrong" for the court below to have "follow[ed] [a] Texas statute" instead of applying "principles of the Mexican statute." *Id.* at 128 (citation omitted). *Slater* accordingly makes clear that the transitory torts doctrine, as applied by U.S. courts, involved the application of causes of action arising under the law of the situs. *See* U.S. Supp. Amicus Br. 18 n.7; *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479 (1912).[3]

Multiple decisions by U.S. state courts are to the same effect. *See e.g.*, *Pease* v. *Burt*, 3 Day 485 (Conn. 1806) (right "founded on ... tort ... acquired under the laws of one government" may be "enforced ... where

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[3] That the transitory torts doctrine historically required application of cause of actions arising under the law of the situs fully responds to Petitioners' speculation that the First Congress would have been concerned that, absent the ATS, state courts would entertain transitory torts cases involving the law of nations. *See* Pet. Supp. Br. 19 ("An artificial territorial limitation on ATS jurisdiction would have forced foreign plaintiffs into state court, precisely the opposite of what the First Congress intended."); *accord* Casto *et al.* Supp. Amicus Br. 6 & n.3. The basic answer to this theory is that Amici are not aware of, and neither Petitioners nor their Amici have cited, *a single* transitory torts case involving the law of nations that would have prompted such a concern by the First Congress. *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784), is not to the contrary. *See* Pet. Supp. Br. 26; Casto *et al.* Supp. Amicus Br. 6 n.3. That case did not involve extraterritorial conduct. The assault on a French Consul occurred in Philadelphia. The tort in violation of the law of nations accordingly did not arise abroad, *see* U.S. Supp. Br. 9 (Marbois incident "occurred within the territory of the United States"), and it was the very type of domestic incident for which Congress enacted the ATS. Because the tort occurred within the United States, there was no need to decide whether such an action could be deemed *transitory*.

the parties happen to be"); *Whitford* v. *Panama R.R. Co.*, 23 N.Y. 465, 471 (1861) (noting "universal[]" practice "by which the courts of one country entertain suits in relation to causes of action which arise in another country" but that "the rule of decision would still be the law of [the foreign situs]"); *Nonce* v. *Richmond & D.R. Co.*, 33 F. 429, 435 (C.C.W.D.N.C. 1887) (under transitory torts doctrine, as "settled by numerous decisions in England and America ... [t]he act complained of must ... be a tort ... in the place where committed"); *Alexander* v. *Pennsylvania Co.*, 30 N.E. 69, 71 (Ohio 1891) ("An act should be judged by the law of the jurisdiction where it was committed."); *Standard Oil Co. of La.* v. *Reddick*, 150 S.W.2d 612, 616 (Ark. 1941) (in transitory torts cases, courts "insist upon the existence of a valid cause of action by the law of the place of the tort" (internal quotation marks omitted)).

Petitioners therefore are correct that adjudicating transitory torts did not "improperly tread[] on the sovereignty of foreign States." Pet. Supp. Br. 20. But they ignore the reason that was so: The transitory torts doctrine vindicated the sovereignty interests of foreign states by enforcing causes of action arising under the substantive law of the situs. The doctrine in that way was a recognition of the sovereignty of a foreign state over conduct occurring within its territory.

Neither Petitioners nor their Amici cite any decision invoking transitory torts principles to justify the extraterritorial application of U.S. law *or* international law to conduct occurring within the territory of a foreign sovereign.[4] Indeed, one group of Amici supporting

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[4] In 1980, the Second Circuit looked to the doctrine of transitory torts as one basis for applying the ATS to conduct occurring

Petitioners candidly acknowledges the absence of such decisions. *See* International Law Scholars Supp. Amicus Br. 18 ("the law defining the tortious conduct in garden-variety transitory actions tends to be the law of the *situs*—the place where the conduct occurs"). Those Amici go so far as to state that it is a "choice-of-law truism" that the law of the situs is the substantive law applied in transitory torts cases. *Id.*

Other Amici, however, attempt to muddy this clarity by suggesting "early transitory cases" in the United States "applied the law of the forum." Casto *et al.* Supp. Amicus Br. 34 n.22. For this proposition, they cite a statement in the Hancock treatise that "[t]he common law was generally assumed to be the same everywhere." Hancock 22. But the very treatise these Amici cite suggests not that these few early decisions applied the substantive law of the forum instead of the law of the situs, but that they were simply silent on the issue. *Id.* at 21. The treatise goes on to explain that the choice-of-law issue was likely "not considered at all" because transitory torts cases often involved torts occurring in another American State and the States had not yet "developed a very extensive local jurisprudence." *Id.* at 22; *see, e.g.*, *Watts* v. *Thomas*, 5 Ky. (2 Bibb) 458 (1811) (holding a Kentucky court had jurisdiction over transitory claims of trespass, assault and battery, and false imprisonment arising in the Indiana territory without discussing the choice-of-law issue).

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abroad. *See Filartiga*, 630 F.2d at 885. But in that case the Second Circuit acknowledged that, under the doctrine, "the conduct complained of" must be "unlawful where performed," and the court noted that the "parties agree[d] that the acts alleged" violated "Paraguayan law." *Id.*

The treatise is clear, moreover, that when choice-of-law questions were actually raised and presented, American courts "almost unanimously" followed the English rule that "[t]he plaintiff who could not make out a good cause of action *under the law of the place of wrong* was not permitted to succeed elsewhere." Hancock 22 (emphasis added).

In short, Amici are not aware of, and neither Petitioners nor their Amici cite, a single historical instance in which a U.S. court invoked transitory torts principles to justify the application of U.S. substantive law or international law to conduct occurring within the territory of a foreign sovereign. The absence of any such judicial authority is fatal to Petitioners' proposed analogy between transitory torts and extraterritorial ATS suits. The historical record makes clear that the transitory torts doctrine had nothing to do with the extraterritorial application of U.S. substantive law. That doctrine as applied historically therefore advanced the basic goal of averting discord between the United States and foreign countries that underlies the presumption against extraterritorial application of U.S. law—the very goal that would be subverted by extraterritorial application of the ATS.[5]

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[5] Contrary to arguments by certain Amici, Attorney General Bradford's opinion is not instructive on whether the transitory torts doctrine was understood to be analogous to extraterritorial ATS litigation. *See* Casto *et al.* Supp. Amicus Br. 18-25; International Law Scholars Supp. Amicus Br. 19-20. Other briefs address the import of that opinion in detail, but the point for present purposes is that the Bradford opinion does not mention the transitory torts doctrine.

C. Extraterritorial ATS Suits Cannot Be Analogized To Transitory Torts Cases On The Theory That International Law Is Effectively The Law Of The Situs

Petitioners and certain of their Amici suggest that any difference between extraterritorial ATS suits and transitory torts cases is merely formalistic, apparently on the view that the international-law norms that define ATS claims are the same around the globe and thus will necessarily be part of the law of the country where the alleged tortious conduct occurred. *See* Pet. Supp. Br. 30 ("[i]n deciding transitory torts cases U.S. courts are simply adjudicating the legal obligations supplied by foreign law" and under the ATS courts are applying "universally-recognized standards" of international law); International Law Scholars Supp. Amicus Br. 18 (suggesting this distinction is "formalism run rampant"). That contention cannot withstand scrutiny for at least three reasons. *First*, many nations (like the United States) have neither made international-law norms self-executing nor otherwise incorporated international law into their domestic law. *Second*, even with respect to norms said to be "universal" at a general level, there remain fundamental disagreements among nations over the precise content of these international-law norms. *Third*, as Justice Breyer emphasized in *Sosa*, even when a foreign country agrees with U.S. courts on the precise definition of "certain universally condemned behavior," it may well not be in "procedural agreement" with the ATS's premise that "universal jurisdiction exists to prosecute" such conduct through a civil action for damages. 542 U.S. at 762 (Breyer, J., concurring in part and concurring in judgment).

1. Many nations have neither made international law self-executing nor otherwise incorporated international law into their domestic law

Application of international-law norms to conduct occurring within the territory of another sovereign raises a significant risk of discord because many nations (like the United States) have neither made international-law norms self-executing nor otherwise incorporated international law into their domestic law. Nations that view international and domestic law as "constitut[ing] a single system" are known as monist, while those that view "each domestic legal system" as "self-contained" and "separate from others and from the international system" are known as dualist. Shelton, *International Law and Domestic Legal Systems* 2 (2011). The core postulate underlying dualism is that "it is for each state to organize its legal system and determine the process for giving its consent to be bound by norms of international law." *Id.* at 3. Dualism thus reflects the position that sovereignty entails the right of each nation to decide for itself whether and how to incorporate international law into domestic law and its domestic legal system.

Although there is widespread variation among nations with respect to the incorporation of international law into domestic legal systems (even within the categories of monism and dualism), *see, e.g.*, Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. Int'l L. & Pol. 707, 716 (2006) (noting "the great variety of ways in which states treat international law vis-à-vis domestic obligations"), "dualism is far more common than truly monist approaches." Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 Ga. J. Int'l & Comp. L. 1,

14 (2006). That many nations embrace some form of dualism with respect to international law by itself makes it untenable to indulge a fiction that international law is the same everywhere and thus effectively the law of the situs for the purpose of invoking an analogy to the transitory torts doctrine.

2. International disagreement remains even regarding putatively universal norms

Even with respect to international-law norms that are widely embraced at a general level, extraterritorial application of the ATS would require federal courts to weigh in on unsettled and contested issues of international law, potentially deciding such questions in ways that differ markedly from the views of the courts or the political branches of the country where the conduct occurred. In that way, extraterritorial ATS suits threaten the sovereignty interests of the situs state in ways that transitory torts cases do not.

Examples of this disagreement abound. For instance, whether international law recognizes aiding-and-abetting liability at all and, if so, whether the mental element for such liability is purpose or knowledge is a source of substantial and persistent disagreement. As certain Amici here explained in the initial round of briefing in this case, there is considerable "dispute" around the globe with respect to the "required *mens rea* for aiding and abetting" in international law and whether a standard broader than purpose is permissible. *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 765 (9th Cir. 2011) (en banc); *see* National Foreign Trade Council *et al.* Amicus Br. 13-29. This dispute, moreover, involves interpreting and reconciling various international documents and writings, as well as arguably conflicting decisions of international tribunals. *See, e.g.*,

Doe v. *Exxon Mobile Corp.*, 654 F.3d 11, 32-39 (D.C. Cir. 2011); *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270-279 (2d Cir. 2007) (Katzmann, J., concurring).

As set forth in the prior amicus brief of the National Foreign Trade Council and others, case law from the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY/ICTR) supports the existence of aiding-and-abetting liability and perhaps the proposition that such liability involves a mens rea of knowledge. *See, e.g.*, *Prosecutor* v. *Blaskic*, No. IT-95-14-A, Judgment, ¶47 (Appeals Chamber July 29, 2004); *Prosecutor* v. *Furundzija*, No. IT-95-17/1-T, Judgment, ¶¶124-130, 232 (Trial Chamber Dec. 10, 1998). The D.C. Circuit relied principally on decisions from the ICTY and ICTR in deciding this question under the ATS. *See Doe*, 654 F.3d at 33-34; *see also* Ruggie *et al.* Supp. Amicus Br. 13 (arguing that a knowledge standard applies). Contrary to those authorities, however, every other leading source for determining the content of customary international law demonstrates that purpose to facilitate a violation, not knowledge alone, is required to establish aiding-and-abetting liability. Those sources include: the Rome Statute of the International Criminal Court, ratified by 120 States; the statute of the international criminal tribunal in East Timor, a U.N. body; a forty-year study of legal principles governing State responsibility for torts carried out by the United Nations' International Law Commission, in extensive consultation with member governments; case law of the International Military Tribunal at Nuremberg; and opinions of foreign international-law experts. *See* National Foreign Trade Council *et al.* Amicus Br. 13-29.

For U.S. courts to address the appropriate mens rea for aiding-and-abetting liability under the ATS

would require resolution of this hotly debated issue of international law, an issue that has divided U.S. courts as well. *Compare Doe*, 654 F.3d at 35-39, *with Khulumani*, 504 F.3d at 275-276 (Katzmann, J., concurring). Many extraterritorial ATS cases, including this one, rely on assertions of aiding-and-abetting liability. Thus, recognizing extraterritorial ATS claims would predictably bring U.S. courts into conflict with the views of foreign states.

A second concrete example of how extraterritorial ATS suits are virtually certain to mire U.S. courts in international disputes about the scope or meaning of international law comes from the original issue prompting this Court's review in this case—namely, whether corporations may be held liable under the ATS. As Respondents persuasively explained in their initial brief (at 27-28), the best reading of international law is that it does not prescribe a specific and universal norm of corporate responsibility for the offenses alleged by Petitioners here. That conclusion, as Respondents explained (at 28-40), is based on a number of "international-law source[s]," including the Convention Against Torture (as interpreted by Congress in the Torture Victims Prevent Act), multiple decisions of international tribunals, and the views of respected jurists and commentators.

Petitioners, on the other hand, attempt to find support for corporate liability under international law in "[g]eneral principles of law common to all legal systems," Pet. Br. 43, and they downplay the relevance of the multiple international-law authorities relied upon by Respondents, *see id.* 48-52; *see also* International Law Scholars Amicus Br. 17-31 (arguing that the distinction between "natural and juristic individuals" has no basis in international law, citing treaties, general

principles, and customary international law); Ruggie *et al.* Supp. Amicus Br. 4-10. Here again, extraterritorial application of the ATS—quite unlike transitory torts cases—would create a recurring risk that U.S. courts would be required to decide this type of controversial point of international law in ways discordant with the views of foreign nations, including perhaps the nation where the conduct occurred. The presumption against extraterritorial application of U.S. law exists precisely to prevent such outcomes. *See supra* pp. 11-13.

Certain Amici acknowledge "there is sometimes room for argument regarding the specific content of an international human rights norm," but they assert that such argument should not occur in ATS cases because *Sosa* insists upon definiteness and universality. Government of the Argentine Republic Supp. Amicus Br. 13; *see* International Law Scholars Supp. Amicus Br. 18; Law of Nation Scholars Supp. Amicus Br. 16-17. But that overlooks that the very act of deciding whether a norm is definite and universal or instead contested could draw U.S. courts into sharp conflict with the views of other nations. There is disagreement, for example, regarding how to identify customary international-law norms. *See* Meyer, *Codifying Custom*, 160 U. Pa. L. Rev. 995, 1002-1003 (2012) (definition of customary international law is "terribly difficult to apply" because there is "little agreement as to how widespread the practice must be or how consistently states must follow the practice" and "scholars and commentators do not agree on what kinds of practice are relevant"). There is also controversy over whether and when a so-called *jus cogens* norm may override a foreign state's withholding of consent to such a norm. *See* Abebe & Posner, *The Flaws of Foreign Affairs Legalism*, 51 Va. J. Int'l L. 507, 546 (2011) ("The idea that *jus*

cogens and other fundamental norms underlie international law and exist in the absence of state consent is highly controversial, to say the least."). In deciding the predicate issue of whether an international-law norm is universal and definite, then, U.S. courts could well decide questions in ways that promote international discord.

3. A consensus that certain conduct is prohibited does not mean there is agreement on jurisdictional or remedial questions

As previously argued by certain Amici, even when there is agreement regarding "certain universally condemned behavior," there must also be "procedural agreement that universal jurisdiction exists to prosecute" such conduct. National Foreign Trade Council *et al.* Amicus Br. 32-33 (quoting *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in judgment)). Otherwise ATS litigation could "undermine the very harmony that it was intended to promote." *Sosa*, 542 U.S. at 761, 762 (Breyer, J., concurring in part and concurring in judgment).

Indeed, even prior to *Sosa*, concerns had been raised within the international community about broad assertions of extraterritorial jurisdiction by U.S. courts under the ATS. Three judges of the International Court of Justice, for example, including the U.S. judge, have noted that "unilateral exercise of the function of guardian of international values" by U.S. courts in ATS cases involving alleged violations of international law by "non-nationals overseas" "has not attracted the approbation of States generally." *Arrest Warrant of April 11, 2000* (Dem. Rep. Congo v. Belg.), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, 2002 I.C.J. 3, ¶48 (Feb. 14); *see also Jones* v.

Saudi Arabia [2007] 1 A.C. 270, 286, ¶20 (H.L.) ("[ATS] decisions are ... important only to the extent that they express principles widely shared and observed among other nations. As yet, they do not."). As one scholar has explained, "[n]egative foreign-policy consequences are potentially realizable in suits under the ATS because a federal court's projection of the law of the United States abroad ... can interfere with a foreign sovereign's choice about how to resolve conflicts within its jurisdiction." Childress, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 734 (2012).

This concern is compounded by the fact that international law typically does not authorize individuals to vindicate rights by bringing actions in domestic judicial forums. Questions of individual remedies for violations of international law are also unresolved and remain a subject of disagreement among nations. *See, e.g.*, Shelton, *Remedies in International Human Rights Law* 1 (1999) ("human rights law has yet to develop a ... consistent practice of remedies for victims of human rights violations"); *Doe*, 654 F.3d at 41 ("the law of nations, outside of certain treaties, creates no civil remedies and no private right of action" (citation omitted).

For that reason, as Respondents persuasively argue (at 16-17), even when there is universal agreement on the content of an international-law norm, there may be sharp disagreement, either as a general matter or in a particular case, over whether a norm should be enforced through a judicial action. For example, the government of South Africa objected for six years that ATS litigation was interfering with its ability to operate a post-apartheid Truth and Reconciliation Commission, as this Court noted in *Sosa*. *See* 542 U.S. at 733 n.21 (explaining that "[t]he Government of South Africa

has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which 'deliberately avoided a "victor's justice" approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill'"). That historical example highlights that many countries may not share the view that resolving violations of international-law norms, even widely accepted ones, calls for adversarial American-style litigation. Some foreign nations may choose to deal with such violations within their territory through non-judicial means—a sovereign prerogative that extraterritorial ATS litigation would effectively frustrate by miring U.S. courts in the matter.

Beyond that, even if there is international consensus on the appropriateness of judicial resolution of an alleged international-law violation, that is a far cry from a consensus that a cause of action should arise in U.S. courts and be governed by U.S. remedial law. The availability of U.S. damages remedies is the subject of international controversy. *See* Bradley & Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137, 149 (2010) ("the practice of some lower courts in the United States of imposing civil liability for alleged human rights abuses committed abroad is viewed outside the United States as illegitimate and indeed as contrary to international law"); *Developments in the Law—Extraterritoriality*, 124 Harv. L. Rev. 1226, 1282-1283 (2011) (noting international criticism of universal civil jurisdiction exercised by U.S. courts under the ATS). The United Kingdom and the Netherlands noted (at 33) in their initial amicus brief in this case, for example, that U.S. judicial forums "accord private plaintiffs a set of advantages that most other

countries have not accepted," including the American rule on litigation costs, broad discovery, class action procedures, and punitive damages.

As a consequence of these differences, even in a hypothetical instance in which the law of the situs has fully incorporated the relevant norm of international law, the exercise of extraterritorial jurisdiction by U.S. courts is more likely to provoke discord than to promote harmony within the international community. This Court has previously recognized the friction that can result from differences in remedial approaches in interpreting the extraterritorial reach of U.S. law. *See Empagran S.A.*, 542 U.S. at 167 (holding in the antitrust context that, "even where nations agree about primary conduct ... they disagree dramatically about appropriate remedies" and on that basis rejecting the view that certain applications of antitrust laws would not produce discord because "many nations have adopted antitrust laws similar to our own").

D. In View Of The Predictable Potential For Extraterritorial ATS Suits To Give Rise To International Discord, Transitory Torts Cases Provide No Support For The Extraterritorial Application Of The ATS

For the reasons given above, extraterritorial ATS suits bristle with potential for sparking international discord. As the United States informed this Court in its supplemental brief (at 18), there is an "inherent potential" for extraterritorial ATS suits "to provoke ... international friction." That assertion is not a mere speculation. It has already been borne out by experience. Indeed, as the United States acknowledges (at 17), "ATS suits have often triggered foreign government protests." This case exemplifies the point. As the

United States notes (at 18), the former government of Nigeria objected to this litigation, as did the governments of the United Kingdom and the Netherlands. In fact, several nations have filed briefs with this Court noting the serious comity concerns raised by extraterritorial ATS suits. *See* United Kingdom *et al.* Supp. Amicus Br. 32; Federal Republic of Germany Amicus Br. 1 ("The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil."); *see also* Resp. Supp. Br. 5-6.[6]

The friction generated by extraterritorial ATS litigation is not new and not unique to this case. As Chevron and others noted in their initial amicus brief (at 8), "*[a]micus* briefs submitted by friendly governments over the years have criticized the assertion of extraterritorial civil jurisdiction over alleged human rights abuses outside the United States as contrary to international law." In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 251, 252 (2d Cir. 2009), for example, the court of appeals noted "Canada's objections to the litigation" and that, in Canada's view, the ATS suit "infringed on its sovereignty" and "violated traditional restraints on the exercise of extra-

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[6] Thus, Petitioners' conclusory statement that the "comity concerns underlying the presumption do not apply because in ATS cases the federal courts are enforcing universally-recognized international standards of conduct" is demonstrably false. Pet. Supp. Br. 35; *accord* American Civil Liberties Union Supp. Amicus Br. 13.

territorial jurisdiction."[7] In *Doe*, Indonesia, as the situs nation, similarly made "strenuous and repeated objections" to the suit. 654 F.3d at 72 (Kavanaugh, J., dissenting in part). And the Ninth Circuit has noted that the government of Papua New Guinea objected for at least two years to the ATS suit at issue in the *Rio Tinto* case. *See Sarei* v. *Rio Tinto, PLC*, 487 F.3d 1193, 1199 (2007) (quoting a "communique stating that the case 'has potentially very serious social, economic, legal, political and security implications for' PNG, including adverse effects on PNG's international relations, 'especially its relations with the United States'"), *rev'd on other grounds en banc*, 550 F.3d 822 (9th Cir. 2008).[8]

In sum, extraterritorial ATS suits differ profoundly from transitory tort actions. The former involve U.S. courts applying a U.S. common-law claim shaped by international-law norms to conduct occurring in a foreign country, whereas the latter historically involved the enforcement of causes of action arising under the law of the situs. Those differences, as Amici have shown, are not formalistic but strike at the core of the purpose of the presumption against extraterritorial application of U.S. law. Extraterritorial ATS suits risk undermining comity by interfering with a foreign sovereign's control of conduct within its territory. The transitory torts

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[7] *See* Brief of Amicus Curiae the Government of Canada in Support of Dismissal of the Underlying Action 10, No. 07-cv-16, *Talisman Energy, Inc.* (2d Cir. May 8, 2007).

[8] *See also* Motion for Leave to File Brief as Amicus Curiae and Brief of the Governments of Australia *et al.* as Amici Curiae in Support of the Petitioners on Certain Questions in Their Petition for a Writ of Certiorari 5, 15, No. 11-649, *Rio Tinto PLC* v. *Sarei* (U.S. Dec. 28, 2011).

doctrine, by contrast, served to promote comity by vindicating the sovereignty interests of foreign nations by giving effect to their laws. Transitory torts cases thus offer no support for extraterritorial application of the ATS.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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